

# **THE ROLE OF SOUTH AFRICA'S GOVERNMENT IN THE XENOPHOBIC VIOLENCE OF MAY 2008**

**BY BRAAM HANEKOM<sup>\*</sup> AND LEIGH ANN WEBSTER<sup>\*\*</sup>**

## **I. INTRODUCTION**

This article aims to explore the systems, conditions, and environment that gave rise to the infamous xenophobic violence that occurred in South Africa in May 2008. In particular, the article lays out the statutory and constitutional rights owed to non-nationals, asylum-seekers, and refugees in South Africa. Next, it examines the role of the South African government in maintaining and perpetuating xenophobic sentiment in contravention of these rights. Finally, the article indicates necessary steps to rectify the underlying causes of xenophobia in South Africa in hope of preventing future violence.

## **II. BACKGROUND**

In Africa, vast numbers of people seek to escape problems ranging from the ongoing conflict in the Democratic Republic of Congo to the complete collapse of states like Somalia and Zimbabwe to the economic crises plaguing comparatively poor countries such as Mozambique and Malawi. While more stable politically and economically, South Africa nevertheless faces its own significant domestic concerns.

Home to millions of immigrants, South Africa has struggled to balance the needs of the immigrant population with those of its own citizens.<sup>1</sup> The African National Congress (ANC), South Africa's ruling

---

<sup>\*</sup> Braam Hanekom is a Zimbabwean-born South African refugee rights activist. He founded People Against Suffering Suppression Oppression and Poverty (PASSOP) in 2007 and continues to act as its coordinator. Fluent in Shona, he currently lives in Cape Town, South Africa, where PASSOP is based. In 2008, he won the Inyathelo Award for Youth in Philanthropy. PASSOP is an organization committed to the promotion and protection of the rights of refugees, asylum seekers and both documented and un-

party, has faced increasing pressure to deliver on pledges made to South Africans during the transition from apartheid and faces many challenges in fulfilling those promises.<sup>2</sup> Many South Africans face extreme poverty, with approximately 50% of the population below the poverty line.<sup>3</sup> In 2007 and 2008, South Africa's unemployment rate was above 22%<sup>4</sup>—a number that is frequently much higher in townships. Blame for economic hardship falls upon non-nationals for causing “enormous financial burden on the country because of their health, education and housing needs.”<sup>5</sup> Accordingly, the tension between nationals and non-nationals looms large.

Beginning in the late 1990s, following the political and economic collapse of Zimbabwe, millions of people<sup>6</sup> migrated from Zimbabwe to South Africa. South Africans met the migration with great political and social resistance. This attitude likely arose in part because Zimbabwe was a former political ally—throughout the controversial rule of former South African President Thabo Mbeki, the South African government protected and, arguably, even supported Zimbabwe's president Robert Mugabe.

---

documented immigrants in South Africa. PASSOP has two components: a community-based branch structure and an NGO side that provides a variety of services aimed at empowering both the branch structures and individual refugees and asylum-seekers. PASSOP's activities are wide-ranging, including aid distribution, protesting, lobbying and legal action. Please see the website ([www.passop.co.za](http://www.passop.co.za)) for more information.

\*\* Leigh Ann Webster is a third year student at Harvard Law School. She interned for the South African Human Rights Commission during the xenophobic crisis of 2008, and has worked extensively with PASSOP while in law school. After graduation, she plans to pursue a career in refugee advocacy.

<sup>1</sup> Estimates vary, but some put the number of immigrants in South Africa as high as five million. Barry Bearak, *Immigrants Fleeing Fury of South African Mobs*, N.Y. TIMES, May 23, 2008, at A10.

<sup>2</sup> African National Congress, *The Freedom Charter* (June 26, 1955), available at <http://www.anc.org.za/ancdocs/history/charter.html> (describing the ANC's promises to its members and to the South African government).

<sup>3</sup> *Id.*

<sup>4</sup> CIA, *THE WORLD FACTBOOK, SOUTH AFRICA* (2009), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html>.

<sup>5</sup> Paul J. Smith, *Military Responses to the Global Migration Crisis: A Glimpse of Things to Come*, FLETCHER F. WORLD AFF., Fall 1999, at 77, 80.

<sup>6</sup> Tara Polzer, *South African Government and Civil Society Responses to Zimbabwean Migration*, POLICY BRIEF No. 22 (S. Afr. Migration Project, Cape Town, S. Afr./Ontario, Can.), Dec. 2008, at 6, available at <http://www.queensu.ca/samp/sampresources/samppublications/policybriefs/brief22.pdf>.

South Africa practiced “quiet diplomacy,” refusing to publicly condemn Mugabe. The South African government maintained an almost complete denial of the Zimbabwean crisis from 2002 until the African National Congress (ANC) recalled President Mbeki in 2008.<sup>7</sup>

The South African government responded to the mass migration from Zimbabwe both passively and aggressively. Despite the huge influx of refugees, the South African infrastructure for processing refugee status applications was not improved. Until late 2007, the Refugee Reception Centre closest to Beitbridge, the busiest border between Zimbabwe and South Africa, was located in Marabastad, five hundred miles away. Many Zimbabweans were arrested while attempting to reach the refugee center, leading to detention and deportation.<sup>8</sup> Those Zimbabweans who reached the centre and attempted to submit their asylum applications faced extraordinarily long lines that the overextended Department of Home Affairs (DHA) was unable to accommodate a situation the South African Human Rights Commission labeled “bureaucratic violence.”<sup>9</sup> Consequently, many asylum seekers, not just Zimbabweans were left without documentation, putting them at constant risk of arrest, detention, and deportation.<sup>10</sup> In order to deal with the mass migration, South Africa maintained its position that there was no crisis in Zimbabwe, deporting for repatriation over 200,000 Zimbabweans in 2007 alone.<sup>11</sup> The mass deportations did not stop trans-border movements; rather, Zimbabweans continued to flood South

---

<sup>7</sup> See *Mugabe Devastated by Mbeki's Recall*, INDEP. ONLINE, Sept. 25, 2008, [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=84&art\\_id=nw20080925124111244C290397](http://www.iol.co.za/index.php?set_id=1&click_id=84&art_id=nw20080925124111244C290397).

<sup>8</sup> ZIMBABWE EXILES FORUM, THE ZIMBABWE EXILES FORUM REPORT ON HUMAN RIGHTS VIOLATIONS AGAINST REFUGEES IN SOUTH AFRICA: HIGHLIGHTING HUMAN RIGHTS CONDITIONS AT THE DEPARTMENT OF HOME AFFAIRS, MARABASTAD BRANCH, PRETORIA 13 (2007), available at [http://www.zimexilesforum.org/Marabastad\\_Report.pdf](http://www.zimexilesforum.org/Marabastad_Report.pdf); *South Africa: A Cold Reception for Zimbabwean Migrants*, IRIN Aug. 16, 2007, <http://www.irinnews.org/report.aspx?ReportID=73770>.

<sup>9</sup> SOUTH AFRICAN HUMAN RIGHTS COMMISSION, SAHRC REPORT ON THE DEP'T OF HOME AFFAIRS' TREATMENT OF NON-NATIONALS 3 (2008) [hereinafter SAHRC DHA REPORT].

<sup>10</sup> GERRY SIMPSON, HUMAN RIGHTS WATCH, NEIGHBORS IN NEED 86 (Bill Frelick ed., 2008), available at [http://www.hrw.org/sites/default/files/reports/southafrica0608\\_1.pdf](http://www.hrw.org/sites/default/files/reports/southafrica0608_1.pdf).

<sup>11</sup> *Id.* at 8.

Africa.<sup>12</sup> In working with Zimbabwean refugees through our organization, People Against Suffering, Suppression, Oppression, and Poverty (PASSOP), it became clear that many viewed deportation as a necessary risk in the desperate struggle for survival.

In May 2008, smoldering feelings of xenophobia erupted in violent riots throughout South Africa, resulting in at least sixty-two deaths and 670 injuries.<sup>13</sup> The violence left the country reeling—how could the new South Africa, the “rainbow nation,” allow such violence to occur? Analysts frequently point to unemployment and corresponding poverty as the primary causes of the xenophobia that has plagued South Africa since the apartheid’s demise.<sup>14</sup> However, this explanation fails to consider the extent of the South African government’s responsibility for the xenophobic sentiments that are “held by virtually every socioeconomic and demographic group in the country.”<sup>15</sup>

### III. IMMIGRATION IN SOUTH AFRICA

It is notoriously difficult to develop official statistics about the number of non-nationals living in South Africa, largely because most are undocumented.<sup>16</sup> Estimates vary greatly, ranging from one to five million, but moderate estimates approximate that there are currently three million

<sup>12</sup> Department of Home Affairs of the Republic of South Africa, Building a New Home Affairs: Presentation to the National Economic Development and Labour Council (NEDLAC) (Oct. 8, 2009) (on file with authors).

<sup>13</sup> AFP, *Xenophobia Death Toll Hits 62*, NEWS 24, May 31, 2008, [http://www.news24.com/Content/SouthAfrica/Xenophobia/1067/73a4bb8625fe462790bd10ab90aba645/31-05-2008-12-00/Xenophobia\\_death\\_toll\\_hits\\_62](http://www.news24.com/Content/SouthAfrica/Xenophobia/1067/73a4bb8625fe462790bd10ab90aba645/31-05-2008-12-00/Xenophobia_death_toll_hits_62).

<sup>14</sup> Human Sciences Research Council (HSRC), HSRC Study on Xenophobia Probes Underlying Causes (June 16, 2008), [http://www.hsrc.ac.za/Media\\_Release-350.phtml](http://www.hsrc.ac.za/Media_Release-350.phtml). See also South African Press Association, *South Africa: Xenophobic Attacks an “Assault on Democracy”* AFRICA.NO, May 13, 2008, <http://www.afrika.no/Detailed/16668.html>.

<sup>15</sup> Ransford Danso & David A. McDonald, *Writing Xenophobia: Immigration and the Print Media in Post-Apartheid South Africa*, AFR. TODAY, Fall 2001, at 116.

<sup>16</sup> SIMPSON, *supra* note 10, at 8-13; Malusi Gigaba, *Migration as a Vehicle for Development*, 27 UMRABULO (2006); Caroline Hawley, *Refugees Flee South Africa Attacks*, BBC NEWS, May 16, 2008, <http://news.bbc.co.uk/2/hi/africa/7404351.stm>.

immigrants living in South Africa.<sup>17</sup> While many immigrants come from countries in southern Africa,<sup>18</sup> there are also significant populations from the Democratic Republic of Congo and Somalia seeking refuge in South Africa.<sup>19</sup>

In South Africa, there is little public recognition of the differences between non-nationals who have used the formal immigration system to enter the country legally, such as those who may be in South Africa on a work permit, and those who fled to South Africa to escape other countries, such as asylum-seekers and refugees.<sup>20</sup> Even among those who do recognize a difference, "there is strong residual suspicion ... that most asylum-seekers are economic migrants in masquerade."<sup>21</sup> This confusion is compounded by at least two factors. First, both economic migrants (those in South Africa seeking employment in large part because of the poor state of their country's economy) and legitimate asylum-seekers are often undocumented. Lack of documentation makes it impossible to determine not only how many non-nationals are in the country, but also their reasons for being there. Second, it is difficult to differentiate between economic migrants and asylum-seekers because many economic migrants apply for asylum-seeker status as a means to remain in the country, at least temporarily.<sup>22</sup>

---

<sup>17</sup> AGENCE FRANCAISE DE DÉVELOPPEMENT, *MIGRATION IN POST-APARTHEID SOUTH AFRICA: CHALLENGES AND QUESTIONS TO POLICY MAKERS* 218 (Aurelia Wa Kabwe-Segatti & Loren Landau, eds., 2008).

<sup>18</sup> See Jonathan Crush, Vincent Williams & Sally Peberdy, *MIGRATION IN SOUTHERN AFRICA*, GLOBAL COMMISSION ON INTERNATIONAL MIGRATION 1, 2 (2005).

<sup>19</sup> Mohammed Allie, *Somalis under Siege in South Africa*, BBC NEWS, Oct. 20, 2006, <http://news.bbc.co.uk/2/hi/africa/6066240.stm>.

<sup>20</sup> Jonathan Crush & David A. McDonald, *Introduction to Special Issue: Evaluating South African Immigration Policy after Apartheid*, AFR. TODAY, Fall 2001, at 1, 6 (noting that the South African population is wary of foreigners).

<sup>21</sup> *Id.* at 6.

<sup>22</sup> FORCED MIGRATION STUDIES PROGRAMME, *CORMSA REPORT: PROTECTING REFUGEES & ASYLUM SEEKERS IN SOUTH AFRICA* (Loren Landau, ed., 2009), <http://www.migration.org.za/report/cormsa-report-protecting-refugees-asylum-seekers-south-africa>.

### A. *Non-Nationals Who Do Not Qualify For Refugee Status*

South Africa's Immigration Act allows individuals to receive temporary residency status for a number of reasons, including studying, working, and joining family in South Africa. To receive a study permit, section 13 of the Act requires that an individual be accepted into a recognized educational institution and have sufficient resources to pay the fees and support himself or herself during the period of study.<sup>23</sup> Study permits allow individuals to undertake part-time work while in school and full-time work during academic vacation periods.<sup>24</sup>

Work permits may also be issued, although a quota system governs the number of permits that can be issued in a given year.<sup>25</sup> For a work permit, the prospective employer must prove that "despite diligent search he or she has been unable to employ a person in the Republic with qualifications equivalent to those of the applicant,"<sup>26</sup> and produce certification that the salary and benefits being offered "are not inferior to those prevailing in the relevant market segment for citizens and residents."<sup>27</sup> Once issued, the holder of the work permit must submit verification of continued employment within six months and every year thereafter.<sup>28</sup> There are additional exceptions for "exceptional skills work permit[s]"<sup>29</sup> and "intra-company transfer work permit[s]."<sup>30</sup> Furthermore, corporate work permits allow an employer to hire a set number of non-nationals without applying for individual work permits.<sup>31</sup>

Finally, a "relative's permit" can be issued "to a foreigner who is a member of the immediate family of a citizen or a resident, provided that

<sup>23</sup> Immigration Act 13 of 2002 s. 13(1)(b)(i)-(iii).

<sup>24</sup> *Id.* s. 13(3)(a)-(b).

<sup>25</sup> *Id.* s. 19(1).

<sup>26</sup> *Id.* s. 19(2)(a) (emphasis removed).

<sup>27</sup> *Id.* 2002 s. 19(2)(b) (emphasis removed).

<sup>28</sup> *Id.* s. 19(3).

<sup>29</sup> *Id.* s. 19(4) (emphasis removed).

<sup>30</sup> *Id.* 2002 s. 19(5) (emphasis removed).

<sup>31</sup> *Id.* s. 21; see also Jonathan Crush & Belinda Dodson, *Another Lost Decade: The Failures of South Africa's Post-Apartheid Migration Policy*, 98 TIJDSCHRIFT VOOR ECONOMISCHE EN SOCIALE GEOGRAFIE 436, 440 (2007).

such citizen or resident provides the prescribed financial assurance....” However, that individual is not allowed to work.<sup>32</sup>

### B. *Refugees and Asylum-Seekers*

During apartheid, the South African government refused to recognize refugees; most notoriously, the South African government did not recognize Mozambicans fleeing civil war as legitimate refugees, denying them the rights and benefits that refugee status entails.<sup>33</sup> In 1998, the new government passed the Refugees Act, which drastically liberalized the country's approach to refugees.<sup>34</sup>

The Refugees Act follows the United Nations (UN) Convention Relating to the Status of Refugees, defining a refugee as an individual in South Africa seeking protection from persecution based on “race, tribe, religion, nationality, political opinion or membership of a particular social group.”<sup>35</sup> Importantly, however, the Act also recognizes individuals who are seeking refuge status because of “external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order.”<sup>36</sup> This second definition comes from the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa.<sup>37</sup>

Section 22 of the Refugees Act requires that the Department of Homes Affairs (DHA) issue temporary permits to asylum-seekers, individuals who have applied for refugee status but whose status has not yet been determined.<sup>38</sup> The duration of the temporary permits range from days up to nine months, in rare cases, and permits must be extended for

<sup>32</sup> Immigration Act 13 of 2002 s. 18(1)-(2) (emphasis removed).

<sup>33</sup> Tara Polzer, *Adapting to Changing Legal Frameworks: Mozambican Refugees in South Africa*, 19 INT'L J. REFUGEE L. 22, 40 (2007) (discussing the Mozambican experience in the radically changing legal context of South Africa).

<sup>34</sup> See generally Refugees[0] Act 130 of 1998.

<sup>35</sup> *Id.* s. 3(a).

<sup>36</sup> *Id.* s. 3(b).

<sup>37</sup> Organization of African Unity [OAU], Convention Governing the Specific Aspects of the Refugee Problems in Africa, art. 1(2), Sept. 10, 1969, 1001 U.N.T.S. 39.

<sup>38</sup> Refugees Act 130 of 1998 s. 22(1); *id.* s. 1(iv), (v), (xv) (differentiating between asylum-seekers (“a person who is seeking recognition as a refugee in the Republic”) and refugees (“any person who has been granted asylum in terms of this Act”)).



the asylum-seeker to remain in the country legally.<sup>39</sup> In reality, this means that when an individual submits his asylum application, he receives a temporary permit, and subsequently goes through the interview process to determine if he will receive official refugee status.<sup>40</sup> If the application for refugee status is rejected, the applicant may file an appeal.<sup>41</sup> It is only after the appeal options are exhausted that the individual must leave the country.<sup>42</sup> Though this process is supposed to take place within a relatively short period of time, it frequently takes over four years for an individual to go through the entire system.<sup>43</sup>

Additionally, the Refugees Act specifically prohibits taking action against those who have applied for asylum or those who intend to apply for asylum, even if they do not have documentation.<sup>44</sup> Even those who have not applied, but who qualify for refugee status, may not be deported because of the non-refoulement principle codified in section 2 of the Refugees Act.<sup>45</sup> The non-refoulement principle, as reflected in the Act, prohibits the government from sending any person back to his or her home country if the person "may be subjected to persecution on account of his

<sup>39</sup> See *id.* s. 22(3).

<sup>40</sup> There is no time limit stated in the Act, but based upon our experience with PASSOP, four years appears to be the normal practice before DHA schedules the requisite interview to determine refugee status.

<sup>41</sup> Refugees Act 130 of 1998 s. 26(1).

<sup>42</sup> Government Notice (GN) R 366/2000 r. 8(2)(c) (stating that "[t]he asylum seeker permit may be withdrawn ... if the asylum application has been rejected and any appeals to the Refugee Appeal board have been exhausted or the time period to file an appeal has lapsed."). If the person does not have a valid asylum-seeker permit and has no other form of documentation, then that person is in the country illegally.

<sup>43</sup> *Id.* r. 3(1) ("Applications for asylum will generally be adjudicated by the Department of Home Affairs within 180 days of filing a completed asylum application with a Refugee Reception Officer."). However, it is clear from our experience that it actually takes years to complete this process.[0]

<sup>44</sup> Refugees Act 130 of 1998 s. 21(4). If a person has gone to DHA, but not yet received his asylum-seeker documents, he has not technically applied for asylum, but his attempt is proof of his intention to apply and may prevent deportation.

<sup>45</sup> *Id.* s. 2. This rule is evidence of South Africa's nominal progressive stance toward those seeking asylum; international law does not prevent refoulement if the individual does not have recognized refugee status. Gregory S. McCue, *Environmental Refugees: Applying International Environmental Law to Involuntary Migration*, 6 GEO. INT'L. ENVTL. L. REV. 151, 154 (1993) (discussing Refugees Act 130 of 1998 s. 2).



or her race, religion, nationality, political opinion or membership of a particular social group” or if that person’s “life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.”<sup>46</sup>

Like the Constitution,<sup>47</sup> the Refugees Act requires that the Act be interpreted consistently with South Africa’s international obligations, including the 1951 UN Convention Relating to the Status of Refugees and its 1967 UN Protocol, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, and the 1948 UN Declaration of Human Rights.<sup>48</sup> The Refugees Amendment Act of 2008 also states that the “Act must be interpreted and applied in a manner that is consistent with any domestic law or other relevant convention or international agreement to which the Republic is or becomes a party.”<sup>49</sup> The Constitutional Court, South Africa’s highest court, found that South Africa’s legal obligations under these treaties were codified in the Refugees Act.<sup>50</sup>

---

<sup>46</sup> Refugees Act 130 of 1998 s. 2.

<sup>47</sup> S. AFR. CONST. 1996 s. 39(1)(b). The Constitution requires that, when interpreting the Bill of Rights, courts *must* consider international law.

<sup>48</sup> See Refugees Act 130 of 1998 pmbl.

<sup>49</sup> Refugees Amendment Act 33 of 2008 s. 2(e). South Africa has ratified the following international human rights treaties: International Convention for the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, U.N.T.S. 195; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Oct. 6, 1999, 2131 U.N.T.S. 83; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Rights of the Child Nov. 20, 1989, 1577 U.N.T.S. 3; and Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Jan. 18, 2002, G.A. Res. 54/263, Annex II, 54 U.N. GAOR Supp. (No. 49) at 6, U.N. Doc. A/54/49, Vol. III (2000).

<sup>50</sup> Minister of Home Affairs v. Watchenuka 2003 SA 1 (SCA) at 2 (S. Afr.) (“The rights and obligations of those who seek asylum are governed by the Refugees Act 130 of 1998, which was enacted to give effect to South Africa’s international obligations to receive refugees in accordance with standards and principles established in international law.”) (finding that a prohibition against working and studying for asylum-seekers who do not yet have refugee status was unconstitutional).

#### IV. RIGHTS OF NON-NATIONALS

##### A. *Statutory Rights of Non-Nationals Who Do Not Qualify for Refugee Status*

The Immigration Act does not specify the rights granted to holders of study, work, or relative permits. However, the Act states that the DHA is required to “educate communities and organs of civil society on the rights of *foreigners, illegal foreigners* and refugees,”<sup>51</sup> a clear indication that non-nationals are entitled to certain rights. Additionally, the Act states that permanent residents have “all the rights, privileges, duties and obligations of a *citizen*, save for those rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to *citizenship*.”<sup>52</sup> While those individuals in the country on a temporary basis are not included, the statute’s human rights framework is clear nonetheless.

##### B. *Constitutional and Statutory Rights of Refugees and Asylum-Seekers*

Section 27 of the Refugees Act establishes rights for refugees.<sup>53</sup> Importantly, refugees are entitled to full legal protection under the South African Constitution,<sup>54</sup> including those rights enumerated in the South African Bill of Rights, except for those rights that only apply to citizens.<sup>55</sup> The constitutional rights limited to citizens include political rights;<sup>56</sup> the right to enter, remain in, and reside anywhere in the country;<sup>57</sup> the right to a passport;<sup>58</sup> and the right to freedom of trade, occupation, or profession.<sup>59</sup> The other rights are granted to “everyone.”<sup>60</sup>

<sup>51</sup> Immigration Act 13 of 2002 s. 2(2)(e).

<sup>52</sup> *Id.* s. 25(1).

<sup>53</sup> Refugees Act 130 of 1998 s. 27.

<sup>54</sup> *Id.* s. 27(b).

<sup>55</sup> S. AFR. CONST. 1996 s. 7-39.

<sup>56</sup> *Id.* s. 19 (including the right to form a political party, the right to vote, and the right to free, fair, and regular elections).

<sup>57</sup> *Id.* s. 21(3).

<sup>58</sup> *Id.* s. 21(4).

<sup>59</sup> *Id.* s. 22.

<sup>60</sup> *Id.* s. 7-39.

Asylum-seekers are entitled to the protection of the South African Constitution.<sup>61</sup> However, since this was accomplished in a recent amendment,<sup>62</sup> courts have not yet determined which rights apply to asylum-seekers as compared to the rest of the population.

It is important to note that South Africa does not officially restrict where refugees and asylum-seekers can live, which means that these individuals are not required to live in refugee camps. The lack of living restrictions is indicative of the rights granted to non-nationals in the Refugees Act.

Beyond the Acts and the Constitution, court decisions regarding the rights of non-nationals indicate that asylum-seekers are entitled to most, if not all, of the same rights as refugees and permanent residents. In *Lawyers for Human Rights v. Minister of Home Affairs*, the Constitutional Court held that “[t]he very fabric of our society and the values embodied in our Constitution could be demeaned if the freedom and dignity of illegal foreigners are violated in the process of preserving our national integrity.”<sup>63</sup>

Similarly, the Constitutional Court held in *Minister of Home Affairs v. Watchenuka* that “[h]uman dignity has no nationality. It is inherent in all people—citizens and non-citizens alike—simply because they are human. And while that person happens to be in this country—for whatever reason—it must be respected, and is protected, by s[.] 10 of the Bill of Rights.”<sup>64</sup> In a case decided shortly after the end of apartheid, the Constitutional Court emphasized the foundational nature of the right to dignity: “Recogni[z]ing a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.”<sup>65</sup> These cases demonstrate that all individuals present in South Africa, regardless of their legal status, have

---

<sup>61</sup> See Refugees Act 130 of 1998 s. 22(1).

<sup>62</sup> Refugees Amendment Act 33 of 2008 s. 21.

<sup>63</sup> *Lawyers for Human Rights v. Minister of Home Affairs* 2004 (1) SA 1 (CC) at 13-14 (S. Afr.).

<sup>64</sup> *Watchenuka*, 2003 SA 1 at 11.

<sup>65</sup> *State v. Makwanyane* 1995 (3) SA 391 (CC) at 179 (S. Afr.).

the right to human dignity. The right to dignity may well entail fulfillment of other rights constitutionally guaranteed.<sup>66</sup>

More contentious rights—such as those requiring the expenditure of funds by the government—also apply to refugees and other permanent residents. In *Khosa v. Minister of Social Development*, the Constitutional Court read the words “or permanent resident” into the Social Security Act in order to require that permanent residents have access to social grants.<sup>67</sup> In doing so, the Court held that the principle of “[e]quality in respect of access to socio-economic rights is implicit in the reference to ‘everyone’ being entitled to have access to such rights....”<sup>68</sup> The Court also emphasized that the Bill of Rights specifically states that the enshrined rights are the “rights of ‘all people in our country.’”<sup>69</sup> Thus, the Court extended legislation to reach non-citizens, although it did differentiate between permanent and temporary residents.<sup>70</sup> However, as both refugees and those seeking asylum strive for permanent residency via refugee status, this distinction may not necessarily preclude asylum-seekers’ eligibility for these rights. Alternatively, those in South Africa on study and work permits may be prevented from accessing these rights because their permits are temporary by nature.

In *Lawyers for Human Rights*, the Constitutional Court stated, “When the Constitution intends to confine rights to citizens it says so.”<sup>71</sup> Because rights apply to “everyone” in most cases,<sup>72</sup> the Court’s statement indicates that the rights to education, health, nutrition, and other fundamental necessities apply to asylum-seekers and temporary residents as well. In *Watchenuka*, the Court held that the right to work and the right to education extend to asylum-seekers.<sup>73</sup> In response to suggestions that these rights would be abused by those fraudulently seeking asylum, the

<sup>66</sup> See Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655, 681 (2008) (discussing ways the right to dignity can be used in the interpretation and enforcement of other human rights).

<sup>67</sup> *Khosa v. Minister of Social Development* 2004 (6) BCLR 569 (CC) at 56 (S. Afr.).

<sup>68</sup> *Id.* at 28.

<sup>69</sup> *Id.* at 30.

<sup>70</sup> *Id.* at 36.

<sup>71</sup> *Lawyers for Human Rights*, 2004 (1) SA 1 at 17.

<sup>72</sup> S. AFR. CONST. 1996 s. 9-18, 23-24.

<sup>73</sup> See *Watchenuka*, 2003 SA 1 at 17-18.

Court stated that that potential problem “provides no reason for limiting the rights of those who are genuine.”<sup>74</sup> The court chose to protect the rights of those seeking asylum, even in the face of the potential for abuse.

## V. XENOPHOBIC VIOLENCE IN SOUTH AFRICA AND THE ROLE OF THE SOUTH AFRICAN GOVERNMENT

Xenophobia has been on the rise in South Africa since the end of apartheid.<sup>75</sup> The xenophobic attacks in May 2008 were not the first attacks targeting foreigners in South Africa.<sup>76</sup> Rather, “there has been a steady increase in the number of actual attacks on foreign nationals since 1994.”<sup>77</sup> Between 1997 and 2007, the South African media frequently reported violence targeting non-nationals, including reports indicating that over 100 Somalis in South Africa had been maimed or killed in xenophobic violence.<sup>78</sup> Although xenophobic violence had become routine, the May 2008 violence was not directed at all non-nationals equally; rather, it primarily targeted foreigners from other African nations who live in informal settlements.<sup>79</sup> While the violence started in Alexandra, a township near Johannesburg, it spread to proximate areas and soon appeared in Cape Town and other places throughout the country.<sup>80</sup> Ultimately, over sixty people were killed and tens of thousands were displaced by the violence.<sup>81</sup> The sheer brutality of the violence, conveyed by an image of a

<sup>74</sup> *Id.* at 15.

<sup>75</sup> HUMAN SCIENCES RESEARCH COUNCIL, *VIOLENCE AND XENOPHOBIA IN SOUTH AFRICA: DEVELOPING CONSENSUS, MOVING TO ACTION* 12 (Adrian Hadland ed., 2008) [hereinafter *VIOLENCE AND XENOPHOBIA*].

<sup>76</sup> *See id.*

<sup>77</sup> *Id.*

<sup>78</sup> Kim Helfrich, *100 Somalis Slain in SA*, *THE CITIZEN* (Johannesburg), Aug. 6, 2007, available at <http://www.citizen.co.za/index/article.aspx?pDesc=44912,1,22>.

<sup>79</sup> “*It is Afriphobia*,” *THE DAILY NEWS* (South Africa), June 19, 2008, at 6, available at <http://www.themercury.co.za/index.php?fSectionId=285&fArticleId=vn20080619094945667C728980>.

<sup>80</sup> *Id.* at 12.

<sup>81</sup> *VIOLENCE AND XENOPHOBIA*, *supra* note 75, at 4.

man burning to death, captured the media attention of South Africa and the global community.<sup>82</sup>

Speculation about the causes of xenophobia in South Africa and, in particular, the xenophobic violence, tends to focus on the prevalence of poverty and unemployment. However, this explanation fails to take into account the extent of the South African government's responsibility in the matter. The argument that the South African government played a vital role in the xenophobic violence is not to say that it created the xenophobia, but rather that the government has done little to alleviate the tension. In contrast, the government has done much to maintain and exacerbate the problem. Xenophobia has been a prevailing sentiment in South Africa since the end of apartheid, leading one commentator to write, "South Africans remain[] deeply divided on many issues but there is one thing on which they have consistently agreed: immigration is a universal bad and should be actively discouraged."<sup>83</sup> Indeed, South Africans of all classes believe that "African migrants are ... responsible for stealing jobs and causing crime in the country and for carrying diseases such as HIV/AIDS."<sup>84</sup>

Despite the widespread nature of these beliefs, they have largely been proven erroneous.<sup>85</sup> Research has indicated that "official numbers of unauthorized migrants are grossly inflated[,] migrants are victims more than perpetrators of crime[, and] migrants and immigrants often expand the size of the [economy]...."<sup>86</sup> However, it is important to understand the government's role in promoting these mistaken beliefs, which culminated in the May 2008 attacks.

#### A. *Reluctance in Changing Immigration Laws*

After apartheid, the new South African government espoused a sense of national unity. Nonetheless, its debates about xenophobia and controlling

<sup>82</sup> See *Flames of Hate*, TIMES LIVE, Feb. 22, 2009, <http://multimedia.thetimes.co.za/photos/2009/02/flames-of-hate>.

<sup>83</sup> Crush & Dodson, *supra* note 31, at 442-43.

<sup>84</sup> Danso & McDonald, *supra* note 15, at 116.

<sup>85</sup> See Crush & McDonald, *supra* note 20, at 7.

<sup>86</sup> *Id.*

immigration contrasted sharply with its public calls for respect for all.<sup>87</sup> Indeed, South Africa's immigration laws were some of the last standing laws of the apartheid era—the oppressive law governing immigration, the Alien Control Act of 1991,<sup>88</sup> was not reformed until 2002, when the Immigration Act finally passed.<sup>89</sup> Even then, however, the Act did not take effect until 2005.<sup>90</sup> Public officials and legislators were reluctant to make the necessary changes to immigration laws because of the apathy, bordering on antagonism, that they felt toward non-nationals during this period and because of the pervading sentiment that “political sensitivity [trumped] the rights of foreigners.”<sup>91</sup> Indeed, delay of reform continued despite the well-known fact that the rights of non-nationals were violated daily. If political actions (or inaction) are to guide the public's perception of a situation, the government's refusal to act screamed to the public that non-nationals lacked importance and did not deserve to have their rights respected. Thus, the government's “official bureaucratic indifference goes hand-in-hand with active discrimination against immigrants.”<sup>92</sup>

Between 1994 and the passage of the Immigration Act in 2002,<sup>93</sup> South Africa's policy toward non-nationals reflected the sentiment that immigrants' rights should be as limited as possible. Rather than implementing an effective system for processing non-nationals seeking to enter the country, the country's policy appeared to be focused on protecting the border and limiting the number of people who could enter. Even when employers were desperate to hire non-nationals to fill their labor needs, the work permits were scarce because the DHA “fallaciously believed that by their mere presence, foreign workers were depriving South Africans of jobs.”<sup>94</sup> The extent to which officials would go to restrict migrants was clear when Joe Modise, former Minister of Defense, with the support of

<sup>87</sup> Polzer, *supra* note 33, at 40 (“[T]he public profession of acceptance and welcome stood in contrast to the national debates on controlling immigration and rising xenophobia that were almost immediate correlates of liberation.”).

<sup>88</sup> Aliens Control Act 96 of 1991.

<sup>89</sup> Immigration Act 13 of 2002.

<sup>90</sup> Crush & Dodson, *supra* note 31, at 436.

<sup>91</sup> Martin J. Murray, *Alien Strangers in Our Midst: The Dreaded Foreign Invasion and “Fortress South Africa,”* 37 CAN. J. OF AFR. STUD. 440, 453 (2003).

<sup>92</sup> *Id.*

<sup>93</sup> Immigration Act 13 of 2002.

<sup>94</sup> Crush & Dodson, *supra* note 31, at 440 (internal citations omitted).



senior South African Defense Force officers, “threatened to switch on the fifteen-thousand-volt electrified fence on South Africa’s northern and eastern borders ‘to lethal mode’” in order to deter would-be immigrants.<sup>95</sup> The government’s refusal to rectify the immigration system reinforced the notion that non-nationals were unwelcome, unimportant, and undeserving of even basic rights.

### B. *Xenophobic Tendencies in Public Officials*

Modise’s statement is indicative of a larger problem among public officials—they themselves are often xenophobic. Before and after the passage of the Immigration Act in 2002, public officials made xenophobic statements erroneously blaming immigrants for crime, the lack of economic development, and a myriad of other problems facing South Africa.<sup>96</sup> As Judith Cohen, the South African Human Rights Commission (SAHRC) representative, noted, “[I]t is clear that there are levels of xenophobia among public officials themselves.”<sup>97</sup> Numerous examples of this xenophobia exist, ranging from DHA officials “repeatedly referr[ing] to non-nationals as ‘those people’ and ‘outsiders,’”<sup>98</sup> to blatant xenophobic statements made by legislators. For example, a former Minister of Home Affairs stated that “if we as South Africans are going to compete for scarce resources with millions of aliens who are pouring into South Africa, then we can bid goodbye to our Reconstruction and Development Programme....”<sup>99</sup> Senior Police Superintendent Johan Steyn claimed that “90 percent of criminals who break into homes, commit armed robbery and rape the women are Zimbabweans.”<sup>100</sup>

These blatantly xenophobic statements by government officials were frequently reported in the media and, combined with the force of the

<sup>95</sup> Murray, *supra* note 91, at 451.

<sup>96</sup> VIOLENCE AND XENOPHOBIA, *supra* note 75, at 13. *See also* Murray, *supra* note 91, at 446.

<sup>97</sup> Interview with Judith Cohen, Head of Programme, Parliamentary Liaison, Legislation and Treaty-Body Monitoring, in Cape Town, S. Afr. (Jan. 14, 2009) [hereinafter Cohen Interview].

<sup>98</sup> SAHRC DHA REPORT, *supra* note 9, at 5.

<sup>99</sup> VIOLENCE AND XENOPHOBIA, *supra* note 75, at 13.

<sup>100</sup> Murray, *supra* note 91, at 446.

government's policies, exacerbated existing anti-foreigner feelings in the country. Research indicates that individuals who identify with a political party may alter their opinions in accordance with statements from top-level politicians in that party.<sup>101</sup> Many South Africans revere the ANC, the party credited with liberating the country,<sup>102</sup> which may make them particularly susceptible to influence from ANC politicians. Additionally, as described above, South Africans are historically anti-foreigner, and thus even more susceptible to xenophobic statements by politicians.<sup>103</sup>

### C. *Failure to Adequately Document the Non-National Population*

The Department of Home Affairs' inability to document both South Africans and non-nationals is well known, well documented, and has been recognized in numerous reports released by the South African Human Rights Commission.<sup>104</sup> There is an enormous backlog of non-nationals who lack documents legalizing their stay in the country because the DHA does not process enough applicants each year. Until quite recently, the Refugee Reception Offices (RROs) in Johannesburg only processed twenty asylum-seeker applicants per day, despite the large numbers of people who attempted to apply each day—lines formed as early as three o'clock in the morning.<sup>105</sup> One undocumented Zimbabwean asylum-seeker, Adonis Musati, starved to death while waiting in the line at the Cape Town Refugee Reception Centre in November 2007.<sup>106</sup> As of October 2009, the number of asylum-seekers, including those recognized as refugees, those on appeal,

<sup>101</sup> See Thomas M. Carsey & Geoffrey C. Layman, *Changing Sides or Changing Minds? Party Identification and Policy Preferences in the American Electorate*, 50 AM. J. POL. SCI. 464-65 (2006).

<sup>102</sup> See Andrew Dawes, *The Effects of Political Violence on Children: a Consideration of South African and Related Studies*, 25 INT'L J. PSYCHOL. 13, 24 (1990) (discussing the reverence participants in the struggle have for the ANC and liberation fighters).

<sup>103</sup> See Crush & Dodson, *supra* note 31, at 442; Danso & McDonald, *supra* note 15, at 116.

<sup>104</sup> See, e.g., SAHRC DHA REPORT, *supra* note 9, at 2.

<sup>105</sup> Jonathan Klaaren & Jaya Ramji, *Inside Illegality: Migration Policing in South Africa after Apartheid*, AFR. TODAY, Fall 2001, at 44.

<sup>106</sup> *Zimbabwean Dies Queuing for Visa*, BBC NEWS, Nov. 12, 2007, <http://news.bbc.co.uk/2/hi/africa/7090730.stm>.

and those still waiting to be processed, totaled 694,557.<sup>107</sup> The massive delay has had devastating consequences on non-nationals, as lack of necessary documentation forces them to live under the constant threat of arrest and deportation, and makes them targets of xenophobia.<sup>108</sup> The delay has increased with the influx of Zimbabweans fleeing political and economic crisis. Because of the desperation of so many unprocessed applicants, corruption has taken hold of the application system;<sup>109</sup> many asylum-seekers believe that it is impossible to get the necessary documents without bribing DHA officials. Asylum-seekers known by PASSOP have reported stories of bribing officials to get their documents, including one woman who paid R1,500 (~\$200) to get her original documents, plus R200 (~\$27) each time she needed to extend her status.

After asylum-seekers submit their initial application, the process to extend their status creates additional problems. Asylum-seekers must go for an interview before a decision about their status can be made.<sup>110</sup> However, it typically takes years before an interview is scheduled, and in the period between the application and the interview, applicants must return to the RRO approximately every six months to get their temporary status extended.<sup>111</sup> For example, as of July of 2008, the DHA was processing asylum-seekers who originally applied in 2004.<sup>112</sup> The process to extend documentation is similarly onerous.<sup>113</sup> As we have observed in our work with PASSOP, asylum-seekers are frequently forced to either return to the RRO for days or weeks on end or bribe DHA officials.

Because individuals without current documentation can be deported, those unable to get the necessary permits are subject to arrest and deportation the moment they leave DHA premises.<sup>114</sup> Failure to have the necessary documentation has dramatically impacted the treatment of

<sup>107</sup> Lynette Johns, *Home Affairs Needs 30 Years to Clear Backlog*, TRIBUNE (South Africa), Oct. 11, 2009, at 21, available at [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=13&art\\_id=vn20091011075132177C650432](http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20091011075132177C650432).

<sup>108</sup> Klaaren & Ramji *supra* note 105, at 44.

<sup>109</sup> See Audie Klotz, *Migration after Apartheid: Deracialising South African Foreign Policy*, 21 THIRD WORLD Q. 831, 838 (2000).

<sup>110</sup> Government Notice (GN) R 366/2000 r. 10; Refugees Act 130 of 1998 s. 22(2)(c), 24.

<sup>111</sup> SAHRC DHA REPORT, *supra* note 9, at 3.

<sup>112</sup> *Id.*

<sup>113</sup> See *id.* at 6, 9-10.

<sup>114</sup> Klaaren & Ramji *supra* note 105, at 43.

non-nationals in the country. In recent interviews with South Africans, a “number of respondents drew a distinction between the ‘illegal’ and ‘legal’ status of foreign migrants, where the illegal status of migrants was criticised [sic]” for the burden they placed on the government and society as a whole.<sup>115</sup> The DHA’s failure to document the vast majority of non-nationals creates a population of illegal immigrants who are then blamed for many of the problems in South African society.<sup>116</sup> The disproportionate numbers of illegal immigrants thus perpetuate the belief that *all* non-nationals are in the country illegally. When considering that the majority of immigrants in South Africa remain undocumented in large part because of the DHA’s incompetence, in combination with the fact that South Africans blame undocumented non-nationals for societal problems, the causal link between the DHA’s actions (or inaction) and the South African xenophobia is apparent.

The DHA’s failure to appropriately document non-nationals not only provides an opportunity for the public to condemn those in the country illegally, but also inhibits non-nationals’ access to basic services, as they often feel that they cannot approach certain institutions or because the service providers have made clear that they will not assist the non-nationals. For instance, non-nationals may refuse to call the police or other protective services because they fear being arrested if their undocumented status is discovered. As SAHRC Representative Cohen stated:

Because non-nationals do not have adequate documentation, it places them in a position of vulnerability.... [T]hey are too scared to come forward to assert/claim their rights from government officials [since] they are scared they will be arrested [and subsequently] deported. This in turn makes non-nationals easy prey for criminals and for those who wish to discriminate against them. For example, it is common knowledge that in some areas of South Africa, non-nationals are referred to as ATMs because it is known that they cannot open bank accounts, that they carry money

<sup>115</sup> VIOLENCE AND XENOPHOBIA, *supra* note 75, at 18.

<sup>116</sup> See SAHRC DHA REPORT, *supra* note 9, at 2.

on them, that you can rob them, and that they can't go to the police to open a case against you.<sup>117</sup>

Furthermore, the PASSOP experience indicates that the undocumented population has been reluctant and afraid to engage state agencies, such as the police, because non-nationals believe that the police simply will not help.

The non-national population's inability to claim basic rights, such as the right to protection from crime, reinforces the public's notion that non-nationals are somehow less important, and that one can subject them to abuse and exploitation without consequence. When this notion goes unchallenged, it contributes to a never-ending cycle in which non-nationals continue to suffer.

Additionally, employers, schools, and other institutions that require legal documentation may refuse to accept expired documentation, which drastically affects the lives of non-nationals. When the public sees that an individual is unable to access basic services like education, it perpetuates the belief that non-nationals are less deserving, less important, and should not be treated with the same respect granted to citizens.

#### D. *Enforcement of Immigration Laws as Crime Prevention*

The DHA's inability to process and document refugees in a timely manner leads to arrests and deportations, which have actually increased since the end of apartheid.<sup>118</sup> In 1990, only 53,418 individuals were deported, primarily to Mozambique, Zimbabwe, and Lesotho.<sup>119</sup> In 2002, this number jumped to 115,794, with most individuals deported to the same three countries.<sup>120</sup> Between 1994 and 2002, South Africa deported more than 1.5 million individuals.<sup>121</sup> More recent reports indicate that in 2007 an estimated 200,000 people were deported to Zimbabwe alone.<sup>122</sup>

<sup>117</sup> Cohen Interview, *supra* note 97.

<sup>118</sup> Crush & Dodson, *supra* note 31, at 446-47.

<sup>119</sup> *Id.* at 447.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 446.

<sup>122</sup> HUMAN RIGHTS WATCH, NEIGHBORS IN NEED: ZIMBABWEANS SEEKING REFUGE IN SOUTH AFRICA 8 (2008).

This number presumably increased in 2008 as people fled election-related violence in Zimbabwe. The “police in South Africa arrest more people for violating immigration laws each year than for any other reason”<sup>123</sup>—a shocking statistic for one of the most violent societies in the world.

Governmental agencies, including the South African Police Service (SAPS) and the National Immigration Branch (NIB), bear the responsibility for arresting and deporting undocumented non-nationals.<sup>124</sup> The arrests and deportations are publicly characterized as the result of concentrated efforts by the police to crack down on crime.<sup>125</sup> Additionally, these agencies rely on procedures that “are dramatically similar to apartheid policing practices”<sup>126</sup> which were notorious for their brutality and disregard for basic human rights. The public labeling of immigration control as crime prevention has been noted and condemned—critics of the practice report that “[h]ighly publicized crackdowns on crime often take the form of massive sweeps through immigrant neighborhoods in which police arrest anyone without proper documentation.”<sup>127</sup> Such operations further the association between being undocumented and committing crimes such as stealing, selling drugs, and killing.<sup>128</sup>

One prominent attempt to enforce immigration policy occurred during an effort dubbed “Operation Crackdown.”<sup>129</sup> During this operation, South African Police Services (SAPS) arrested over 7,000 allegedly undocumented non-nationals, although some had documents at home and others had documents that were destroyed by the police.<sup>130</sup> When the SAHRC condemned the government for the harsh arrest and detention conditions used during Operation Crackdown, governmental officials “criticized the SAHRC for undermining the government’s efforts to

---

<sup>123</sup> Murray, *supra* note 91, at 453.

<sup>124</sup> South African Department of Home Affairs, Home Affairs Statement on the Arrest of 81 Illegal Foreigners (July 14, 2006), [http://www.home-affairs.gov.za/media\\_releases.asp?id=344](http://www.home-affairs.gov.za/media_releases.asp?id=344).

<sup>125</sup> Murray, *supra* note 91, at 452-53; see Crush & McDonald, *supra* note 20, at 6 (“The police and the army have played major roles in enforcement with little more than administrative oversight from the Department of Home Affairs.”).

<sup>126</sup> Crush & McDonald, *supra* note 20, at 7 (internal quotations and citations omitted).

<sup>127</sup> Murray, *supra* note 91, at 452-53.

<sup>128</sup> *Id.*

<sup>129</sup> Klaaren & Ramji *supra* note 105, at 36.

<sup>130</sup> *Id.*

control crime in South Africa and for 'creating the impression of being sympathetic' to undocumented immigrants."<sup>131</sup> SAPS officials later explained that those who had committed "less serious crimes," such as being in the country without documentation, were arrested for deterrence purposes, an indication that "immigrants were viewed as criminals per se, and arrested as a prophylactic measure."<sup>132</sup> The agency's assumption was that immigrants would commit later crimes. Perhaps most importantly, as part of the operation, the Minister of Safety and Security, Steve Tshwete, requested that South Africans "'assist in the war against crime' [by helping to identify immigrants], thus encouraging vigilante justice and exacerbating xenophobia."<sup>133</sup>

By orchestrating efforts in which immigrants were arrested at the same time as other criminals (i.e. those accused of non-status related crimes), and by blatantly labeling undocumented non-nationals as criminals, the government created and maintained the notion that non-nationals were responsible for South Africa's extensive crime problem.<sup>134</sup> Consequently, as South Africans hope for and work to establish safer communities, they understandably wish for the removal of non-nationals. The government's failure to document non-nationals exacerbates this situation in two ways. First, as indicated above, the state is largely responsible for the fact that many non-nationals are without documentation, making them targets for arrest.<sup>135</sup> Second, by dubbing this population "illegal immigrants," the authorities create considerable confusion over the reasons foreigners are undocumented. Such terminology creates the impression that undocumented immigrants have made the conscious and criminal decision to remain undocumented. Thus, state officials continually feed the notion that these individuals are criminals, all the while contributing to their undocumented status.

<sup>131</sup> *Id.* at 37 (internal citation omitted).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* (internal citation omitted).

<sup>134</sup> Murray, *supra* note 91, at 453-54; see, e.g., Klaaren & Ramji *supra* note 105, at 36-37.

<sup>135</sup> See Crush & Dodson, *supra* note 31, at 446-47.



## VI. MOVING FORWARD

Since the violence of May 2008, most non-nationals have returned to their communities in South Africa, although some returned to their home countries.<sup>136</sup> However, research suggests that there is a substantial chance that another bout of xenophobic violence will erupt in the future, perhaps on an even greater scale than the May 2008 attacks.<sup>137</sup> In fact, in 2009, there have been other instances of xenophobic violence. In January, an attack by an armed mob forced three non-nationals to jump from a building window, leading to one man's death,<sup>138</sup> and in February, seven Zimbabweans were killed in a fire that led to a xenophobia investigation by the police.<sup>139</sup> In December, xenophobic violence in De Doorns, a farming community approximately two hours outside of Cape Town displaced over 2,000 people.<sup>140</sup>

The South African government has been incredibly reluctant to address the persistent xenophobia among the general population, perhaps due to the government's own xenophobic beliefs. In a report released by the Human Sciences Research Council soon after the May 2008 attacks, focus group respondents identified the government's failure to communicate with South Africans about the reasons behind the violence and possible solutions to the problem as key elements of the ongoing problem.<sup>141</sup> One South African asked directly, "[W]hy [the government] don't [sic] call a meeting ... and ask what the problem is [sic]."<sup>142</sup>

<sup>136</sup> *South Africa: African governments begin repatriating their nationals*, IRIN, May 22, 2008, <http://irinnews.org/Report.aspx?ReportId=78361>.

<sup>137</sup> See generally VICKI IGGLEDEN, TAMLYN MONSON, & TARA POLZER, OXFAM GB, *HUMANITARIAN ASSISTANCE TO INTERNALLY DISPLACED PERSONS IN SOUTH AFRICA: LESSONS LEARNED FOLLOWING ATTACKS ON FOREIGN NATIONALS IN MAY 2008* (2009).

<sup>138</sup> Ntokozo Mfusi & Jeff Wicks, *Mob Forces Men to Jump*, MERCURY (South Africa), Jan. 6, 2009, at 1.

<sup>139</sup> Michelle Jones, *Xenophobia Probe after Seven Die in Shack Fire*, CAPE TIMES, Feb. 24, 2009, at 3.

<sup>140</sup> Regan Thaw, *Human Right Violations in De Doorns*, EYE WITNESS NEWS (Cape Town), Dec. 15, 2008, <http://www.eyewitnessnews.co.za/articleprog.aspx?id=28619>.

<sup>141</sup> VIOLENCE AND XENOPHOBIA, *supra* note 75, at 16-17.

<sup>142</sup> *Id.* at 17.

The government's engagement with the local population could help in a number of ways. First, the government could correct key misunderstandings about the situations faced by non-nationals, both in their home countries and in South Africa. For example, there are at least three common and important misconceptions that the government could help to repair: (1) non-nationals take the jobs of South Africans; (2) non-nationals come to South Africa by choice, are affluent, and want to remain here forever;<sup>143</sup> and (3) non-nationals are more dangerous than South Africans and are responsible for South Africa's crime problem.<sup>144</sup> Such views are simply inaccurate. Of course, any effort at education would have to correspond with a parallel change in governmental attitudes towards non-nationals.

Second, rather than being seen as a detriment to South African society, the presence of non-nationals could, and should, be viewed as a benefit to society. Non-nationals running businesses in the townships frequently rent property from South Africans, supplementing the South Africans' incomes, and South Africans can buy goods cheaply from these non-nationals, as non-nationals generally have lower prices than others.<sup>145</sup> Additionally, there is evidence that non-nationals expand the size of the economy and are frequently able to employ South Africans, thus creating, rather than taking jobs.<sup>146</sup>

Furthermore, the South African government could educate the public by providing reliable information about non-nationals' reasons for migration. There is little understanding of the difference between asylum-seekers and other immigrants in South Africa; therefore, South Africans often do not differentiate between types of non-nationals when determining which rights and services the non-nationals should receive.<sup>147</sup> Furthermore, education about the problems that individuals face coming

<sup>143</sup> See *id.* at 19 (quoting a focus group participant: "They have money so they gain access to everything.").

<sup>144</sup> See *id.* at 21 ("Foreign nationals are also seen as particularly brutal and violent as it is believed that they do not have social attachments to the people they live with. As one focus group participant explained: 'We are even afraid of taking guests out after a visit because we might come across people we don't know (foreigners) and they will kill us, it's unlike back in the day when we knew each other; we have become victims in our own country so it's them we must fight against.'").

<sup>145</sup> *Id.* at 24.

<sup>146</sup> Crush & McDonald, *supra* note 20, at 7.

<sup>147</sup> Crush & Dodson, *supra* note 31, at 445.

from refugee-producing countries, such as the Democratic Republic of the Congo or Somalia, or countries with enormous human rights concerns, such as Zimbabwe, could alleviate some xenophobia. SAHRC Representative Cohen echoed this recommendation when she stated that South Africans “don’t [sic] have the information necessary to empathize and understand how difficult [non-nationals’ lives] have truly been—and to know [that with their presence], they add greater diversity to our society and ... bring skills with them.”<sup>148</sup>

Although certain situations, such as that of Zimbabwe, are well covered in the media, it is necessary for the government to take on the kind of education effort described above, as media coverage is not enough. In certain areas, the media sources may not be in a language that can be understood by the entire population. For instance, large portions of the black population in the Western Cape only speak Xhosa,<sup>149</sup> so the English and Afrikaans newspapers are ineffective for Xhosa-only speakers. Additionally, the media does not adequately report the conditions in many countries such that the South African population can grasp what immigrants are escaping from when they flee to South Africa.

This educational effort is not only a moral responsibility of the government, but it is also required by law. The Immigration Act states that the DHA must pursue the objective of “[p]romoting a human-rights based culture in both government and civil society in respect of immigration control.”<sup>150</sup> The Immigration Act also obligates the DHA to “educate communities and organs of civil society on the rights of *foreigners*, *illegal foreigners* and refugees, and conduct other activities to prevent xenophobia.”<sup>151</sup> Consequently, the government must take on educational campaigns and attempts to engage the local population in order to alleviate

<sup>148</sup> Cohen Interview, *supra* note 97. Cohen also notes, however, that no matter how much education is provided, given the scarcity of both resources and opportunities available in South Africa, there will always be some form of “scapegoating.”

<sup>149</sup> Provincial Profile: Western Cape, Department of Cooperative Governance & Traditional Affairs, Republic of South Africa, [http://web.ndmc.gov.za/Profiles/Provincial\\_Profiles/WC\\_Introduction.htm](http://web.ndmc.gov.za/Profiles/Provincial_Profiles/WC_Introduction.htm).

<sup>150</sup> Immigration Act 13 of 2002 s. 2(1)(a).

<sup>151</sup> *Id.* s. 2(2)(e).

xenophobia. This requirement is recognized both by SAHRC staff<sup>152</sup> and by the non-nationals affected by xenophobia.<sup>153</sup>

## VII. CONCLUSION

As has been demonstrated in this article, the South African government has proven itself hostile towards non-nationals living within its borders, encouraging and facilitating xenophobia rather than taking steps to protect the rights of those who are frequently the most vulnerable in its society. The government's hostility has taken a variety of forms, including public xenophobic statements made by its representatives and the refusal or inability to document non-nationals. To make matters worse, the apartheid-era methods that have been used in the arrests of undocumented non-nationals have created the perception that these non-nationals are criminals devoid of rights in South Africa.

The failure to supply basic rights to the masses of impoverished South Africans adds an additional obstacle to South Africa's ability to ensure basic rights to non-nationals. For example, through our work in the field, we learned that the living standards in disaster response camps following the xenophobic violence exceeded the living standards of poor South African communities at the time. Thus, regardless of how minor the resources allocated for asylum-seekers, the government's attempts to meet the needs of migrants creates tensions in the impoverished South African communities. Nonetheless, the continued political and economic instability in Zimbabwe, combined with forced excess migration caused by the prohibitive, restrictive camp systems used in northern African countries<sup>154</sup> results in a large migrant population with serious needs. While the needs of the migrants must not be ignored, so too must the South African

<sup>152</sup> Cohen Interview, *supra* note 97 ("Greater educational awareness is needed. Even though it's taught in schools, maybe it needs to be reinforced.").

<sup>153</sup> Interview with Barbara Zhungu, Zimbabwean, in Cape Town, S. Afr. (Jan. 28, 2009) ("What they need to do is to educate their people, to let the people know why xenophobia is bad, why it is not good.").

<sup>154</sup> See Regional Operations Profile: Africa, United Nations High Commissioner for Refugees, <http://www.unhcr.org/pages/4a02d7fd6.html> (describing the UNHCR's work in refugee camps).

government address the needs of its citizens before anger erupts into violence once again.